U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: January 26, 2001

CASE NO: 2000-INA-70

In the Matter of

CALIFORNIA BABY PHOTOGRAPHER
Employer

on behalf of

ANDREAS DIETER HIRSCH
Alien

Appearances: Eliezer Kapuya, Esq.
For Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from California Baby Photographer's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On June 14, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Andreas Dieter Hirsch. (AF 36-37). The job opportunity was listed as "Productor [sic] and Marketing Director". The job duties were described as follows:

> Will supervise photographer and telemarketer. Will computerize telemarketer room and networking div. offices.

(AF 36). The stated job requirements for the position, as set forth on the application, included 3 years of experience in the job offered. (Id.). The Application was amended on October 9, 1995, in response to an assessment notice sent by the EDD on September 19, 1995, requesting more information on the job duties. (AF 39). The amendment provided the following job description:

> plans and prepares production schedules for photographer and telemarketer. Draws up master schedule to establish sequence and lead time of each photographers appointment and inventory flow of taken appointments. Analyzes photographers work and calculates future appointments and the human resources requirements. Prepares inventory reports, photographic orders according to customers specifications, purchase orders for Films and photographic equipment. Will use computer, telephone, fax machine, copy machine, calculator.

(Id.). The required experience was amended to include 3 years in the job offered or 3 years in the related

occupation of "Baby Photographer." (Id.).

The EDD referred the resumes of 3 U.S. applicants to Employer in January of 1996. (AF 75-77, 92-94). On March 12, 1996, Employer submitted its Results of Recruitment Report stating that none of the applicants were hired. (AF 69). Employer asserted that applicant Kimble never contacted the Employer, applicant Sargent was interviewed but never submitted a list of references' phone numbers as requested by Employer, and that applicant Montegary was interviewed but had more "lab tectonic experience than in photography." (Id.).

On December 16, 1997, the CO remanded the application to the EDD because Employer's advertisement did not describe the same job Employer stated in their amendment letter of October 9, 1995. (AF 65). The CO found that there were three job titles present: "Production Superintendent [sic], Production Planner, and Productor and Marketing Director." (Id.). Employer readvertised the position from February 2, 1998 to February 4, 1998, under the title "Production Superintendent." (AF 54-56). On March 4, 1998, the EDD referred a fourth U.S. applicant to Employer. (AF 51-53). Employer stated in its Results of Recruitment submitted March 26, 1998, that this applicant, Tanya Cuda, was interviewed and found not qualified because she did not have three years experience as a Superintendent or Baby Photographer. (AF 45).

The CO issued a Notice of Findings ("NOF") on November 10, 1998, proposing to deny the certification for several reasons. (AF 30-34). First, the CO found that the requirement experience as a baby photographer is unduly restrictive as it is not normal to the industry. (AF 31). The CO failed to see how a qualified photographer could not perform the job duties after a brief demonstration. (Id.). Employer was instructed to either amend the restrictive requirement, submit evidence that the requirement arises from a business necessity, or to submit documentation that the requirement is usual in the occupation/industry. (AF 31-32). Second, the CO found that the Employer's job description contained a combination of duties in violation of 20 C.F.R. 656.21(b)(2)(ii). (AF 32). The combination of duties at issue is "production superintendent/buyer ('prepares ... photographic orders, ... purchase order for Films and photographic equipment.')/systems analyst ('analyzes ... and calculated future appointments and the human resource requirements.')." (Id.). The Employer was instructed to revise the job duties to eliminate the combination of duties situation or to justify the combination of duties as either a business necessity or common in the labor force. (Id.). Third, the CO found that two of the U.S. applicants, Montegary and Cuda, were rejected for non lawful job-related reasons and one U.S. applicant, Sargent, was rejected because of an undisclosed requirement. The CO explained that based on the finding that the experience as a baby photographer requirement was unduly restrictive, applicant Montegary and applicant Cuda, were rejected for other than lawful, job-related reasons. (AF 33). In addition, the CO noted that applicant Montegary reported that Employer never contacted him. Applicant Sargent was found not qualified for the position because he did not possess the requirement of references. (Id.). The CO stated that this requirement was not shown on the ETA 750 Part A and therefore the Employer cannot "at this point cite the lack of the requirement as justification for the finding that the U.S. [applicant was] not qualified." (Id.). The CO explained that the burden of proof is on the Employer to show that U.S. workers are not able, willing,

qualified or available for this job opportunity and to show that the U.S. workers are not qualified based on their failure to possess the requirements set forth on the ETA 750 Part A.

The Employer submitted its rebuttal on December 8, 1998. (AF 20-29). The Rebuttal consisted of a letter from Employer attempting to justify the restrictive requirements and combination of duties based upon business necessity and three "expert opinions describing the requirements to be a specialist in baby photography, and why this studio is one of the three successful studios which is engaged only in producing baby photographs."[1] (AF 20). Employer explained that California Baby Photographers is a small to mid-size corporation, which requires its employees to be versatile. (AF 25). In attempting to justify the business necessity of the requirements for the position, Employer asserted that the position requires knowledge of baby photography as well as clerical and computer knowledge. (Id.). Employer argued that baby photography requires special knowledge and skill in the ability to prepare the baby in a photographic pose, and requires skills that will "put the baby for two seconds in a sitting position without the baby falling down, in order to shoot a couple of photographic shots as rapidly as possible." (AF 20). Employer argued that a photographer must be trained for some time and will reach his full potentials after years, and must have the capacity to take commercial pictures of babies in order to survive economically in this field. Concerning the combination of duties, Employer argued that:

> A Production Superintendent, as a byproduct of this position, is required to purchase films and photographic equipment in order to produce the final photographic product required by the customer. The purchasing power of this task is not dependent position of a buyer [sic]. The Production Superintendent is not the overall-purchasing agent of the photographic studio. He only orders films from the supplier in order to perform his services.

(Id.). In addition, Employer argued that the word "analyzes" has nothing to do with human resources requirements. The Production Superintendent, as part of his job, has to "plan the future activities of taking various baby pictures ordered by the customer, and facilitate the accessibility of his customers to acquire the services of a photographer." (Id.). Employer asserted that the job consists of "incidental analyses of planning of production, and is not an independent job of computing analyses, or in charge of human resources." (AF 20-21). Employer stated that it does employ three "appointment setter, customer service and data entry clerks." (AF 26). The Production Superintendent will supervise the employees, smoothen the production and be able to design and develop the necessary computer tasks. (Id.).

Employer also argued that U.S. workers were rejected for lawful job-related reasons. With regard

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[1] We note that one of these "expert opinions" was written by Employer's representative and one of the opinions was written by an employee of the Employer. Only one "expert opinion" was written by someone who did not work for Employer.

to applicant Montegary, Employer argued that it talked extensively to this applicant in "his studio"[2] and cannot understand why the applicant reported to the Department of Labor that he was never contacted. (AF 21). Employer argued that applicant Montegary has experience only in photographic lab work and he never worked as a photographer. With regard to applicant Cuda, Employer argued that during her interview, applicant Cuda stated that she "did not feel [safe] at the location of employer's business, which is in Lincoln Heights in the City of Los Angeles. She was extremely afraid of the neighborhood where the photographic studio is located." (Id.). In addition, Employer argued that the applicant stated that she did photographic work incidentally, and was in fact more a ballet dancer than a photographer. Employer found that applicant Cuda's credentials were not justified for the position to be filled. Finally, with regard to applicant Sergent, Employer argued that:

> Mr. Sergent was definitely interviewed very extensively by the employer. He promised the employer he would bring [in] the next day verification that he worked in this field, or fax that information to the [employer], and that he would bring references and proof that he was a skilled photographic Production Superintendent. He failed to come to his second appointment.

(AF 22). Employer stated that it called the applicant several times, but Mr. Sergent did not return Employer's calls.

The CO issued a Final Determination ("FD") on June 7, 1999, denying certification. (AF 16-18). The CO reviewed the Employer's rebuttal and concluded that it failed to satisfactorily rebut all of the findings in the NOF. The CO explained that the NOF questioned the necessity of three years experience as a baby photographer and Employer rebutted with two expert letters, one of which was from one of Employer's employees, which describe the trials, travails and rewards of photographing infants and toddlers. The CO found that these letters stated nothing that would establish how much experience is needed to be proficient in baby photography. The CO also noted that "since this petition is for a Production Superintendent who would not be dealing with the babies to be photographed , we fail to see the connection between the requirement and the job performed." (AF 17). In addition, the CO noted that the alien only shows free-lance experience with babies and not the studio experience the experts described. The CO concluded that Employer failed to establish that this requirement was either reasonable or of a business necessity. With regard to the combination of duties, the CO found that Employer's rebuttal states that the only buying this position does is of film and that the systems analysis about the future appointments and human resources is only "incidental" to the job, but that Employer "did not amend the ETA750A as the NOF directed." (Id.). The CO also found that Employer never mentioned when the "extensive"

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[2] It is not clear from Employer's rebuttal whether or not this interview took place in person at Employer's studio or on the telephone while that applicant was at the studio where he presently is employed.

interview with applicant Montegary took place, and the fact that Employer rejected him solely on the grounds that he has insufficient photography experience "indicates you did not explore his production superintendent experience. His resume shows he has experience touching on all the major points of the job description." (AF 18). The CO found that Employer's rejection of applicant Cuda similarly does not evaluate her abilities as production superintendent or photographer, but dwells on her reaction to the business neighborhood and other experiences she has had. Finally, the CO found that Employer did not give the date of the "extensive" interview with applicant Sergent and Employer admitted to not raising the requirement of references until the time of the interview, which would give the appearance of putting an obstacle in the way of an otherwise able and available U.S. applicant. The CO found that Employer gave no grounds for finding this applicant unable to perform the stated job duties. (Id.).

The Employer filed a Request for Review on June 17, 1999. (AF 1-15). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. The Employer submitted a brief in support of its Appeal on January 13, 2000.

Discussion

The issues presented by this appeal are whether the Employer's alternative requirements of three years of experience as a baby photographer were unduly restrictive, and whether applicant Montegary was rejected for a lawful job-related reason.

The Board has considered the use of alternative requirements in the matters of *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*). In *Kellogg*, the Board held that: Any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the Employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States. The job requirements shall be those defined for the job in the Dictionary of Occupational Titles ("DOT") and shall not include requirements for a language other than English. 20 C.F.R. § 656.21(b)(2). There are, however, legitimate alternative job requirements, which can, and should be permitted in the labor certification process. These alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered normal for a § 656.21(b)(2) analysis.

Here, the Employer has specified the job requirements for a "Production Superintendent" as three years experience as a "Baby Photographer." The CO questioned whether this requirement was normal for the industry, but focused the corrective actions on establishing why three years experience was necessary, rather than on establishing whether the experience as a baby photographer is substantially equivalent to the position of Production Superintendent and whether it is essential to the performance of

the duties of that job. The NOF, while citing the correct regulations, did not recognize our finding in *Kellogg*. Instead, the NOF confused the issue by suggesting that the violation could have been cured by establishing business necessity for the alternative requirement. The CO did not advise the Employer to cure the defect by readvertising the position to permit applicants with other suitable combinations of education, training or experience, as required by *Kellogg*.

We also note that while the CO did raise the issue that the alternate requirement of three years experience as a baby photographer was unduly restrictive, the CO should have also found that the Employer's alternative requirements are unlawfully tailored to the Alien's qualifications in violation of 20 C.F.R. § 656.21(b)(5). We have held in *Francis Kellogg, et als.*, *supra*, that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications in violation of 20 C.F.R. §§ 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

Here, the Employer's primary requirement is for three years of experience in the Job Offered (Production Superintendent). The Alien does not have three years of experience as a Production Superintendent. (AF 116, item 15). The Alien only potentially qualifies for the job because of the alternate requirement of experience as a Baby Photographer. Therefore, under *Kellogg*, the alternative requirements are unlawfully tailored to the Alien's qualifications in violation of 20 C.F.R. §§ 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training, or experience are acceptable. The CO, however, did not raise the issue that the Alien only qualified for the job because of the alternative requirements until the FD, and therefore the Employer was not put on notice of this deficiency. A CO cannot raise an issue for the first time in the FD, or rely upon evidence not mentioned in the NOF. *Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989) (*en banc*) (a CO cannot raise an issue for the first time in the FD); *Shaw's Crab House*, 87-INA-714 (Sept. 30, 1988) (*en banc*) (the Final Determination may not deny certification on the basis of evidence not cited in the NOF).

Although the CO did not provide Employer with sufficient notice of the deficiencies stated above, the issue still remains as to the availability of U.S. workers. Section 656.21(b)(6) states that an employer is required to document that U.S. applicants were rejected solely for job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Café*, 1990-INA-26 (Jan. 24, 1991). Section 656.24(b)(2)(ii) provides that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers.

The CO found that the Employer did not explain, with specificity, the lawful, job-related reason for rejecting applicant Montegary. In response to a follow up questionnaire sent by the local office, applicant Montegary responded that he was never contacted for an interview and thus never interviewed. (AF 78). The CO correctly brought Montegary's questionnaire to the Employer's attention in the NOF, thereby affording the Employer an opportunity to rebut Montegary's statement. The CO instructed the Employer to further document the reasons for his rejection and that the documentation must show that the applicant was not qualified, willing or available to fill the job vacancy of Production Superintendent. The Employer responded that it "talked to [applicant Montegary] extensively in his studio." (AF 21). Employer did not provide the date of the interview or any evidence that this interview took place. In addition, the reason provided for rejecting this applicant was that he had experience only in photographic lab work and he never worked as a photographer. (Id).

Employer's rebuttal to the NOF was inadequate. Questionnaire responses are not per se unreliable, rather, an assessment of their reliability must be made in light of the circumstances. *See Cathay Carpet Mills, Inc., d/b/a The Walnut Company*, 87-INA-161 (Dec. 7, 1988) (*en banc*); *Joseph General Electrical Contractor*, 91-INA-173 (July 14, 1992). Where an employer's response differs from an applicant's response, the CO may not assume that greater weight is to be given to the applicant's response. *See Dove Homes, Inc.*, 97-INA-680 (May 25, 1988) (*en banc*). Where an employer's statements are contradictory and unsupported, however, the CO may properly give greater weight to applicants' statements that they were not contacted. *Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989). In this case, the applicant filled out a questionnaire four months after the applicant submitted his resume and clearly wrote in: "Never contacted. Cannot understand why." It is possible that contact did occur with Mr. Montegary, which the Employer considered an interview, and that Mr. Montegary does not recall ever being contacted, however, there is no evidence of when the applicant was contacted, nor is there any evidence that the applicant was not qualified for the position. Based on the applicant's resume, Mr. Montegary has four years of experience as a "Production Manager" at a photographic studio. The job was described as "Manage production of twelve employees while continuing to improve operations such as; customer service, traffic, quality control, waste and inventory." (AF 82). This experience appears to constitute three years experience as a "Production Superintendent" as the job duties appear to be the same. The sole reason provided for the rejection of applicant Montegary was that his experience was that his experience was in photographic lab work only, and that he never worked as a photographer. The available position, however, is not for a photographer, but rather a Production Superintendent. The requirement of three years experience as a baby photographer was an alternative requirement. Employer specified in its rebuttal that it was looking for someone who can "supervise the employees, smoothen the production and be able to design and develop the necessary computer tasks. The person has to have an eye on the amount of leads collected; the appointments booked out of leads and be always able to follow up with the high quality standards we demand on the photographers." (AF 26). We fail to see how the applicant's lack of experience as a photographer, when he has worked as a "Production Manager" for a photography studio, is a lawful job-related reason for rejection.

The NOF put the Employer on actual notice that it had not adequately explained its rejection of U.S. applicant Montegary. Since the Employer, in its rebuttal, failed to meet the standards set forth in 20 C.F.R. 656.21(j)(1)(iv), it is unnecessary to discuss whether the Employer adequately explained the rejection of applicants Cuda and Sergent. The Employer has failed to sustain its burden of proof that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform the work required in its application for alien labor certification. It is therefore unnecessary to discuss the remaining issue of the combination of duties. The Evidence of record supports the CO's denial of labor certification under the Act and regulations.

Order

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California